EDITOR'S NOTE

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A-738

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1390

THE REPUBLIC OF PARAGUAY and
JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States, and
JOSÉ MARÍA GONZALEZ AVILA, Consul General of the Republic of Paraguay to the United States,
Petitioners,

— v. —

JAMES S. GILMORE III, Governor of the Commonwealth of Virginia, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPLICATION FOR STAY OF OR INJUNCTION AGAINST EXECUTION

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Dated: April 10, 1998

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TABLE OF CONTENTS

PAGE

Table of Authorities ii

Statement of Relevant Proceedings Since the Filing of the Application 2

I. The Decision of The International Court Of Justice Is Binding Upon the United States, And This Court Should Give It Effect 4

II. For Reasons of Comity and Respect for the Rule of Law, This Court Should Give Effect to the Decision of the International Court of Justice in the Exercise of Equitable Discretion 9

Conclusion 11

TABLE OF AUTHORITIES

CASES

Application of Vienna Convention on Consular Relations (Para. v. U.S.), No. 99 (Provisional Measures Order of Apr. 9, 1998) 3, 10

Chorzów Factory (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Judgment (Indemnity) of Sept. 13) 2

Cooper v. Aaron, 358 U.S. 1 (1958) 6, 7

E-Systems, Inc. v. The Islamic Republic of Iran, Award No. ITM 13-338-FT (Feb 4, 1983), 2 Iran-U.S. CTR 51, 57 (1983) 6

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 10

Interhandel (Switz. v. U.S.), 1959 I.C.J. 6 (Preliminary Objections Order of March 21) 4

Marbury v. Madison, 1 Cranch 137 (1803) 7

Northern Cameroons (Cameroon v. U.K.) 1963 I.C.J. 15 (Interim Protection Order of Dec. 2) 6

Nuclear Tests (N.Z. v. France), 1973 I.C.J. 135 (Interim Protection Order of June 22) 5

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 9

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 7

United States v. Pink, 315 U.S. 203 (1942) 7

United States v. San Francisco,
310 U.S. 16 (1940) 10

Zschernig v. Miller,
389 U.S. 429 (1968) 7

CONSTITUTION, STATUTES, AND TREATIES

U.S. CONST., art. VI, cl. 2. 6

42 U.S.C. § 1983 7

Statute of the International Court of Justice, arts. 36, 41, 59 Stat. 1055 4

U.N. CHARTER, art. 7 4

U.N. CHARTER, art. 92 . . . . . 4, 6

U.N. CHARTER, art. 93 4

U.N. CHARTER, art. 94(1) 5

Vienna Convention on Consular Relations,
Apr. 24, 1963, TIAS 6820, 21 U.S.T. 77 2

Vienna Convention on the Law of Treaties,
May 22, 1969, U.N. Doc. A/CONF. 39/27, 8 I.L.M. 679 5

MISCELLANEOUS

Frank Green, *Try to Stop Execution, U.S. Told*, RICHMOND TIMES DISPATCH
(Apr. 10, 1998), p. A1 8

IAN BROWNLIE, STATE RESPONSIBILITY, Part 1 (1983) 7

Jiménez de Aréchaga, *International Responsibility*, *in* MANUAL OF PUBLIC
INTERNATIONAL LAW, 531 (Max Sørensen, ed., 1968) 8

Manley Ottmar Hudson, The Permanent Court
of International Justice, 1920-1942 (1943) 6

Report of the Int'l Law Comm'n, U.N. GAOR, 51st Sess., Supp. No. 10,
U.N. Doc. A/51/10 (1996) 7, 8

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW
OF THE UNITED STATES (1987) 4, 5

IN THE

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THE REPUBLIC OF PARAGUAY and
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SUPPLEMENTAL APPLICATION FOR STAY OF OR INJUNCTION AGAINST EXECUTION

To the Honorable William H. Rehnquist, Chief Justice of the United States and Circuit Justice for the Fourth Circuit, petitioners the Republic of Paraguay, Jorge J. Prieto, as Ambassador of the Republic of Paraguay to the United States, and José María Gonzales Avila, as Consul General of the Republic of Paraguay to the United States, respectfully urge as an additional ground in support of their pending application for a stay of or injunction against the impending execution that on April 9, 1998, the International Court of Justice issued an order indicating provisional measures

directing that the United States of America ensure that Paraguay's national, Angel Francisco Breard, not be executed pending resolution of Paraguay's case against the United States.

It is critical to the rule of law for which the United States has stood since its founding that the ICJ's order be respected and implemented. Indeed, given the position of the United States in the world today, it is inconceivable that the United States would not comply. It would be fully appropriate for this Court, given its role in upholding the rule of law in this country, to serve as the organ of the United States by which the ICJ's order is given effect.

STATEMENT OF RELEVANT PROCEEDINGS SINCE THE FILING OF THE APPLICATION

On April 3, 1998, the Republic of Paraguay instituted proceedings in the International Court of Justice against the United States, claiming that by failing to notify its national, Angel Francisco Breard, of his right to contact the Paraguayan consulate at the time of his arrest on suspicion of capital murder, officials of the Commonwealth of Virginia had violated the Vienna Convention on Consular Relations, Apr. 24, 1963, TIAS 6820, 21 U.S.T. 77. Paraguay sought, among other remedies, *restitutio in integrum*, or the restoration of the situation that had existed prior to the unlawful act or omission. *See, e.g.*, Chorzów Factory (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Judgment (Indemnity) of Sept. 13). In conjunction with its application instituting proceedings, Paraguay requested that the ICJ indicate provisional

measures directing the United States to ensure that Mr. Breard not be executed during the pendency of the proceedings.

On the same day, the ICJ scheduled a hearing on the request for provisional measures for Tuesday, April 7. By letter to the Clerk of this Court dated April 5, 1998, Paraguay lodged copies of its application instituting proceedings and its request for provisional measures.

On the scheduled date, the ICJ, all fifteen judges sitting, heard argument on Paraguay's request for provisional measures at the Peace Palace in The Hague. Yesterday, April 9, the Court issued a unanimous order that "the United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order." Application of Vienna Convention on Consular Relations (Para. v. U.S.), No. 99 (Provisional Measures Order of Apr. 9, 1998). The order also stated that the Court would "ensure that any decision on the merits [would] be reached with all possible expedition." Judge Stephen M. Schwebel of the United States, the President of the Court, concurred in the order and issued a separate declaration, in which he stated that the provisional measures ordered "ought to be taken to preserve the rights of Paraguay in a situation of incontestable urgency." The Court's order and the separate declarations are attached to this memorandum as Exhibit A.

Proceedings in the ICJ now commence pursuant to its Order, also dated April 9, 1998, scheduling the filing of the memorials of Paraguay and the United States for June 9 and September 9, respectively. If this Court were to grant Paraguay's petition, the parties would have an opportunity to consider whether a suspension of the ICJ proceedings would be appropriate. *See* Petition at 28 n.18; *cf.* Interhandel (Switz. v. U.S.), 1959 I.C.J. 6 (Preliminary Objections Order of March 21) (dismissing diplomatic protection proceedings after grant of writ of certiorari by this Court).

I.

THE DECISION OF THE INTERNATIONAL COURT OF JUSTICE IS BINDING UPON THE UNITED STATES, AND THIS COURT SHOULD GIVE IT EFFECT.

The International Court of Justice is "the principal judicial organ of the United Nations." U.N. CHARTER, art. 92. As a principal organ of the United Nations, the ICJ is equal to the Security Council and the General Assembly. *Id.*, art. 7. By subscribing to the United Nations Charter, the United States became a party to the Statute of the International Court of Justice. *Id.*, art. 93; *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 903 cmt. c (1987).

Article 41 of the Statute of the Court provides that it "shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

Statute of the International Court of Justice, Oct. 24, 1945, arts. 36, 41, 59 Stat. 1055. While the ICJ has not itself ruled whether an order indicating provisional measures is binding on the parties, RESTATEMENT § 903 cmt. e (1987), there can be no serious question that it is.

First, pursuant to Article 94(1) of the United Nations Charter, the United States has "undertake[n] to comply with the decision of the International Court of Justice in any case to which it is a party." In turn, in a standard and oft-repeated formulation, the ICJ has explained that

> the power of the Court to indicate provisional measures under Article 41 of the Statute has as its object to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings . . . .

Nuclear Tests (N.Z. v. France), 1973 I.C.J. 135 (Interim Protection Order of June 22). In other words, the authority to indicate provisional measures is intended to ensure that the Court remains in a position to render a meaningful judgment. Even were an order indicating provisional measures not regarded as a "decision" requiring compliance under the Charter, an agreement to comply with the judgment of a court cannot be squared with the latitude to deprive the court of its ability to render an effective judgment by disregarding a provisional order intended to preserve the rights subject to such a judgment. Hence, by agreeing to abide by the decision of the ICJ in this case, the United States has also agreed to abide by an order indicating provisional measures intended to ensure the effectiveness of any such decision. *E.g.*, Vienna

Convention on the Law of Treaties, May 22, 1969, art. 26, U.N. Doc. A/CONF. 39/27, 8 I.L.M. 679 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

Second, as noted, the ICJ is "the principal *judicial* organ of the United Nations." U.N. CHARTER, art. 92 (emphasis added). It is intrinsic to the very definition of a court that a party subject to its jurisdiction must comply with its orders, decisions, and rulings. *E.g.*, *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958). As Judge Sir Gerald Fitzmaurice stated in his separate opinion in the *Northern Cameroons Case*, explaining why provisional measures must be binding:

> Although much . . . of [the ICJ's] incidental jurisdiction is specifically provided for in the Court's Statute, or in Rules of Court which the Statute empowers the Court to make, it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court -- or any court of law -- being able to function at all.

(Cameroon v. U.K.) 1963 I.C.J. 15, 103 (Interim Protection Order of Dec. 2) (separate opinion of Judge Fitzmaurice). To similar effect, the Iran-United States Claims Tribunal, sitting in Full Tribunal and with the concurrence of all three United States Members, has held that it "has an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective." *E-Systems, Inc. v. Islamic Republic of Iran*, Award No. ITM 13-338-FT (Feb 4), 2 Iran-U.S. CTR 51, 57 (1983); *see also* MANLEY OTTMAR HUDSON, THE PERMANENT COURT OF

INTERNATIONAL JUSTICE, 1920-1942, 426 (1943) ("a State is under an obligation to respect the Court's indication of provisional measures").

Finally, pursuant to the Supremacy Clause, the United States' international obligations form part of "the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. It is plainly the function of this Court both to state that law and to ensure compliance by state officials with that law. *E.g.*, *Marbury v. Madison*, 1 Cranch 137, 177 (1803); *Cooper*, 358 U.S. at 18-19. In particular, state interests cannot override federal authority in the area of foreign relations. *United States v. Pink*, 315 U.S. 203, 234 (1942) (individual states "do[] not exist" for foreign relations purposes); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 304, 315-22 (1936) (because states never had sovereignty for purposes of foreign relations, federal government's authority in the area is plenary); *see also Zschernig v. Miller*, 389 U.S. 429 (1968). Indeed, as a matter of international law, this Court, as a component of the judicial branch of the United States Government, has the capacity to engage the international responsibility of the United States and, correspondingly, the obligation to comply with the United States' international obligations. IAN BROWNLIE, STATE RESPONSIBILITY, Part 1, 144 (1983) ("The judiciary and the courts are organs of the state and they generate responsibility in the same way as other categories of officials."); *Report of the Int'l Law Comm'n*, U.N. GAOR, 51st Sess., Supp. No. 10, at 126, U.N. Doc. A/51/10 (1996) (Draft Articles on State Responsibility) ("Draft Articles").

This Court can and should effect the United States' compliance with the ICJ's order and hence with its international obligations by granting a stay of or injunction against the execution scheduled for April 14, 1998, pending resolution of Paraguay's proceedings against the United States in the International Court of Justice. The United States is responsible under international law for the acts of its constitutent entities. *See, e.g.*, Jiménez de Aréchaga, *International Responsibility*, *in* MANUAL OF PUBLIC INTERNATIONAL LAW, 531, 557 (Max Sørensen, ed., 1968) ("It is a generally accepted principle of international law that a federal state is responsible for the conduct of its political sub-divisions and cannot evade that responsibility by alleging that its constitutional powers of control over them are insufficient for it to enforce compliance with international obligations."); Draft Articles at 127. In any event, article 36 of the Vienna Convention expressly imposes its consular notification obligations on all "competent authorities" of the United States. Nevertheless, the Governor of the Commonwealth of Virginia has made clear that he will look to this Court to tell him whether he should comply with the ICJ order. *See, e.g.*, Frank Green, *Try to Stop Execution, U.S. Told*, RICHMOND TIMES DISPATCH (Apr. 10, 1998), p. A1, A12 ("Asked [Governor] Gilmore's reaction to the International Court's ruling, his spokesman, Mark A. Minor, said yesterday that 'the Governor will continue to follow the U.S. courts and the United States Supreme Court.'"). In its brief *amicus curiae* to the Court of Appeals, the United States confirmed that the federal courts may enforce compliance by state officials with the United States' international obligations. U.S. Br.

at 23 (Exhibit 6 to Application for Stay of or Injunction Against Execution (Mar. 31, 1998) (citing *United States v. Arlington*, 669 F.2d 925, 929-30 (4th Cir.) (suit by United States under Supremacy Clause to enforce treaty), *cert. denied*, 459 U.S. 801 (1982)). There is no reason to require the United States to initiate a new action in federal court when a stay or injunction could issue in this action, or to allow the Governor of Virginia to determine whether the United States will comply with the ICJ's order.

II.

FOR REASONS OF COMITY AND RESPECT FOR THE RULE OF LAW, THIS COURT SHOULD GIVE EFFECT TO THE DECISION OF THE INTERNATIONAL COURT OF JUSTICE IN THE EXERCISE OF EQUITABLE DISCRETION.

Regardless of the binding effect of the provisional measures indicated by the ICJ on their own terms, they form an independently adequate ground on which this Court should grant the application for a stay or injunction. The essence of equitable discretion is flexibility, and no factor carries as much weight in the exercise of that discretion than the public interest. *Porter v. Warner Holding Co.*, 328 U.S. 395, 400 (1946). When the public interest is involved, the Court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Id.* "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go

when only private interests are involved." *United States v. San Francisco*, 310 U.S. 16, 30-31 (1940); *see also Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946) (when "federal right for which the sole remedy is in equity" is asserted, federal courts "have the duty . . . , sitting as national courts throughout the country," to enforce the right based on principles of federal equity jurisprudence).

Here, the national interest lies in showing respect for a unanimous ruling of the International Court of Justice. As both the major force in international affairs and a nation long committed to the rule of law, the United States would advance the public interest by respecting a ruling of the principal judicial organ of the United Nations. As Judge Schwebel, President of the ICJ, stated in explaining his vote in favor of the order:

> It is of obvious importance to the maintenance and development of a rule of law among States that the obligations imposed by treaties be complied with and that, where they are not, reparation be required. The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States). In my view, these considerations outweigh the serious difficulties which this Order imposes on the authorities of the United States and Virginia.

Vienna Convention on Consular Relations (Para. v. U.S.) (Provisional Measures Order of Apr. 9, 1998) (Declaration of President Schwebel).[1] As Judge Schwebel

---

1. Before his election to the Court in 1981, Judge Schwebel served as, among (continued...)

recognized, if the United States wishes to advance the rule of law, it must show respect for the rule of law even when -- indeed, especially when -- compliance poses "serious difficulties."

In the exercise of its equitable discretion, in the interest of the rule of law, and out of comity to the principal judicial organ of the modern international legal order, this Court should give effect to the order indicating provisional measures by staying or enjoining the execution of Mr. Breard pending resolution of Paraguay's proceedings in the International Court of Justice against the United States.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the original Application and the Reply in further support, Paraguay respectfully requests that this Court grant (1) a stay of execution of Paraguay's national, Angel Francisco Breard, now scheduled for April 14, 1998, pending resolution of Paraguay's petition for a writ of certiorari and, if the writ is granted, further order of the Court, or in the alternative,

1. (...continued)
other things, Deputy Legal Advisor to the United States Department of State and Executive Director of the American Society of International Law. Pursuant to Article 32(1) of the Rules of the Court, Judge Schwebel, as a national of the United States, does not preside in Paraguay's proceeding against the United States.

an order temporarily enjoining respondent Virginia officials from carrying out the execution subject to the same terms, and (2) a stay of or injunction against the execution pending resolution of Paraguay's proceeding against the United States in the International Court of Justice.

Dated: April 10, 1998

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Donald Francis Donovan, Counsel of Record for Petitioners the Republic of Paraguay, Ambassador Jorge J. Prieto and Consul General José María Gonzalez Avila, hereby certify under penalty of perjury that on April 10, 1998, I caused a copy of the Supplemental Application for Stay of or Injunction Against Execution to be served by first-class mail of the United States Postal Service upon and sent a copy also by telecopy to

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Dated: April 10, 1998
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General List No. 99

INTERNATIONAL COURT OF JUSTICE
9 April 1998

CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS
(PARAGUAY v. UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *Vice-President* **WEERAMANTRY**, *Acting President*; *President* **SCHWEBEL**; *Judges* **ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK**; *Registrar* **VALENCIA-OSPINA**.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court,

Having regard to the Application filed in the Registry of the Court on 3 April 1998, whereby the Republic of Paraguay (hereinafter "Paraguay") instituted proceedings against the United States of America (hereinafter "the United States") for "violations of the Vienna Convention on Consular Relations [of 24 April 1963]" (hereinafter the "Vienna Convention") allegedly committed by the United States,

Makes the following Order:

1. Whereas, in its aforementioned Application, Paraguay bases the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention on Consular Relations ("the Optional Protocol");

2. Whereas, in the Application, it is stated that in 1992 the authorities of the Commonwealth of Virginia arrested a Paraguayan national, Mr. Angel Francisco **Breard**, whereas it is maintained that he was charged, tried, convicted of culpable homicide and sentenced to death by a Virginia court (the Circuit Court of Arlington County) in 1993, without having been informed, as is required under Article 36, subparagraph 1 *(b)*, of the Vienna Convention, of his rights under that provision, whereas it is specified that among these rights are the right to request that the relevant consular office of the State of which he is national be advised of his arrest and detention, and the right to communicate with that office, and whereas it is also alleged that the authorities of the Commonwealth of Virginia also did not advise the Paraguayan consular officers of Mr. Breard's detention, and that those officers were only able to render assistance to him from 1996, when the Paraguayan Government learnt by its own means that Mr. Breard was imprisoned in the United States;

3. Whereas, in the Application, Paraguay states that Mr. Breard's subsequent petitions before federal courts in order to seek a writ of *habeas corpus* failed, the federal court of first instance having, on the basis of the doctrine of "procedural default", denied him the right to invoke the Vienna Convention for the first time before that court, and the intermediate federal appellate court having confirmed that decision, whereas, consequently, the Virginia court that sentenced Mr. Breard to the death penalty set an execution date of 14 April 1998, whereas Mr. Breard, having exhausted all means of legal recourse available to him as of right, petitioned the United States Supreme Court for a writ of *certiorari*, requesting it to exercise its discretionary power to review the decision given by the lower federal courts and to grant a stay of his execution pending that review, and whereas, while this request is still pending before the Supreme Court, it is however rare for that Court to accede to such requests; and whereas Paraguay stated, moreover, that it brought proceedings itself before the federal courts of the United States as early as 1996, with a view to obtaining the annulment of the proceedings initiated against Mr. Breard, but both the federal court of first instance and the federal appellate court held that they had no jurisdiction in the case because it was barred by a doctrine conferring "sovereign immunity" on federated states, whereas Paraguay also filed a petition for a writ of *certiorari* in the Supreme Court, which is also still pending, and whereas Paraguay furthermore engaged in diplomatic efforts with the Government of the United States and sought the good offices of the Department of State;

4. Whereas, in its Application, Paraguay maintains that by violating its obligations under Article 36, subparagraph 1 *(b)*, of the Vienna Convention, the United States prevented Paraguay from exercising the consular functions provided for in Articles 5 and 36 of the Convention and specifically for ensuring the

protection of its interests and of those of its nationals in the United States; whereas Paraguay states that it was not able to contact Mr. Breard nor to offer him the necessary assistance; and whereas accordingly Mr. Breard "made a number of objectively unreasonable decisions during the criminal proceedings against him, which were conducted without translation", and "did not comprehend the fundamental differences between the criminal justice systems of the United States and Paraguay"; and whereas Paraguay concludes from this that it is entitled to *restitutio in integrum*, that is to say "the re-establishment of the situation that existed before the United States failed to provide the notifications . . . required by the Convention";

5. Whereas Paraguay requests the Court to adjudge and declare as follows:

> "(1) that the United States, in arresting, detaining, trying, convicting, and sentencing Angel Francisco Breard, as described in the preceding statement of facts, violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, as provided by Articles 5 and 36 of the Vienna Convention;
>
> (2) that Paraguay is therefore entitled to ***restitutio in integrum***;
>
> (3) that the United States is under an international legal obligation not to apply to the doctrine of 'procedural default', or any other doctrine of its internal law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and
>
> (4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against Angel Francisco Breard or any other Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;
>
> and that, pursuant to the foregoing international legal obligations,
>
> (1) any criminal liability imposed on Angel Francisco Breard in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;
>
> (2) the United States should restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of Paraguay's national in violation of the United States' international legal obligations took place; and
>
> (3) the United States should provide Paraguay a guarantee of the non-repetition of the illegal acts";

6. Whereas, on 3 April 1998, after having filed its Application, Paraguay also submitted an urgent request for the indication of provisional measures in order to protect its rights, pursuant to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court;

7. Whereas, in its request for the indication of provisional measures, Paraguay refers to the basis of jurisdiction of the Court invoked in its Application, and to the facts set out and the submissions made

therein; and whereas it reaffirms in particular that the United States has violated its obligations under the Vienna Convention and must restore the *status quo ante*;

8. Whereas, in its request for the indication of provisional measures of protection, Paraguay states that, on 25 February 1998, the Circuit Court of Arlington County, Virginia, ordered that Mr. Breard be executed on 14 April 1998; whereas it emphasizes that "[t]he importance and sanctity of an individual human life are well established in international law" and "[a]s recognized by Article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall be protected by law"; and whereas Paraguay states in the following terms the grounds for its request and the possible consequences of its dismissal:

> "Under the grave and exceptional circumstances of this case, and given the paramount interest of Paraguay in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Paraguay's national and the ability of this Court to order the relief to which Paraguay is entitled: restitution in kind. Without the provisional measures requested, the United States will execute Mr. Breard before this Court can consider the merits of Paraguay's claims, and Paraguay will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favour";

9. Whereas Paraguay asks that, pending final judgment in this case, the Court indicate:

> "*(a)* That the Government of the United States take the measures necessary to ensure that Mr. Breard not be executed pending the disposition of this case;
>
> *(b)* That the Government of the United States report to the Court the actions it has taken in pursuance of subparagraph *(a)* immediately above and the results of those actions; and
>
> *(c)* That the Government of the United States ensure that no action is taken that might prejudice the rights of the Republic of Paraguay with respect to any decision this Court may render on the merits of the case";
>
> and whereas it asks the Court moreover to consider its request as a matter of the greatest urgency "in view of the extreme gravity and immediacy of the threat that the authorities . . . will execute a Paraguayan citizen";

10. Whereas, on 3 April 1998, the Ambassador of Paraguay to the Netherlands addressed a letter to the President of the Court requesting the Court to fix an early date for a hearing on his Government's request for provisional measures, asking the Member of the Court who, in accordance with the provisions of Article 13, paragraph 1, and Article 32, paragraph 1, of the Rules of Court, would exercise the functions of President in the case to "call upon the United States of America to ensure that Mr. Breard is not put to death before the Court's ruling on Paraguay's request for provisional measures", and indicating that he had been appointed as Agent of Paraguay for the purposes of the case;

11. Whereas, on 3 April 1998, the date on which the Application and the request for provisional measures were filed in the Registry, the Registrar advised the Government of the United States of the filing of those documents, communicated the text of them to that Government by facsimile and sent it a certified copy of the Application, in accordance with Article 40, paragraph 2, of the Statute of the Court and Article 38, paragraph 4, of the Rules of Court, together with a certified copy of the request for the indication of provisional measures, in accordance with Article 73, paragraph 2, of the Rules of Court; and whereas the

Registrar also sent the Government of the United States a copy of the letter addressed that day to the President of the Court by the Agent of Paraguay.

12. Whereas, by identical letters dated 3 April 1998, the Vice-President of the Court addressed both Parties in the following terms:

> "Exercising the functions of the presidency in terms of Articles 13 and 32 of the Rules of Court, and acting in conformity with Article 74, paragraph 4, of the said Rules, I hereby draw the attention of both Parties to the need to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects";

and whereas, at a meeting held the same day with the representatives of both Parties, he advised them that the Court would hold public hearings on 7 April 1998 at 10 a.m., in order to afford the Parties the opportunity of presenting their observations on the request for provisional measures;

13. Whereas, by a letter dated 5 April 1998, received in the Registry on 6 April 1998, the Ambassador of the United States to the Netherlands informed the Court of the appointment of an Agent and a Co-Agent of his Government for the case;

14. Whereas, pending the notification under Article 40, paragraph 3, of the Statute of the Court and Article 42 of the Rules of Court, by transmission of the printed text, in two languages, of the Application to the Members of the United Nations and to other States entitled to appear before the Court, the Registrar, on 6 April 1998, informed those States of the filing of the Application and of its subject-matter, and of the request for the indication of provisional measures;

15. Whereas, on 6 April 1998, the Registrar, in accordance with Article 43 of the Rules of Court, addressed the notification provided for in Article 63, paragraph 1, of the Statute to the States, other than the Parties to the dispute, which on the basis of information supplied by the Secretary-General of the United Nations as depositary appeared to be parties to the Vienna Convention and to the Optional Protocol;

16. Whereas, at the public hearings held on 7 April 1998, in accordance with Article 74, paragraph 3, of the Rules of Court, oral statements on the request for the indication of provisional measures were presented by the Parties:

On behalf of Paraguay: by H. E. Mr. Manuel María Cáceres,
Mr. Donald Francis Donovan,
Mr. Barton Legum,
Dr. José Emilio Gorostiaga.

On behalf of the United States: by Mr. David R. Andrews,
Ms Catherine Brown,
Mr. John R. Crook,
Mr. Michael J. Matheson.

and whereas at the hearings a question was put by a Member of the Court, to which a reply was given orally and in writing;

* * *

17. Whereas, at the hearings, Paraguay reiterated the line of argument set forth in its Application and its request for the indication of provisional measures;

18. Whereas at the hearing, the United States argued that Mr. Breard's guilt was well established, and pointed out that the accused had admitted his guilt, which Paraguay did not dispute, whereas it recognized that Mr. Breard had not been informed, at the time of his arrest and trial, of his rights under Article 36, subparagraph 1 *(b)*, of the Vienna Convention, and indicated to the Court that this omission was not deliberate; whereas it nonetheless maintained that the person concerned had had all necessary legal assistance, that he understood English well and that the assistance of consular officers would not have changed the outcome of the proceedings brought against him in any way; whereas, referring to State practice in these matters, it stated that the notification provided for by Article 36, subparagraph 1 *(b)*, of the Vienna Convention is unevenly made, and that when a claim is made for failure to notify, the only consequence is that apologies are presented by the government responsible; and whereas it submitted that the automatic invalidation of the proceedings initiated and the return to the *status quo ante* as penalties for the failure to notify not only find no support in State practice, but would be unworkable;

19. Whereas the United States also indicated that the State Department had done everything in its power to help the Government of Paraguay as soon as it was informed of the situation in 1996, and whereas it stated that when, on 30 March 1998, Paraguay advised the Government of the United States of its intention to bring proceedings before the Court if the United States Government did not take steps to initiate consultation and to obtain a stay of execution for Mr. Breard, the Government of the United States had emphasized *inter alia* that a stay of execution depended exclusively on the United States Supreme Court and the Governor of Virginia;

20. Whereas the United States furthermore maintained that Paraguay's contention that the invalidation of the sentence of a person who had not been notified pursuant to Article 36, subparagraph 1 *(b)*, of the

Vienna Convention could be required under that instrument, has no foundation in the relevant provisions, their *travaux préparatoires* or the practice of States, and that, in the event, Mr. Breard has not been prejudiced by the absence of notification, and whereas it pointed out that provisional measures should not be indicated where it appears that the Applicant's argument will not enable it to be successful on the merits;

21. Whereas the United States also stated that, when the Court indicates provisional measures under Article 41 of its Statute, it must take the rights of each of the Parties into consideration and ensure that it maintains a fair balance in protecting those rights; whereas that would not be the case if it acceded to Paraguay's request in these proceedings, and whereas the measures requested by Paraguay would prejudice the merits of the case;

22. Whereas the United States finally alleged that the indication of the provisional measures requested by Paraguay would be contrary to the interests of the States parties to the Vienna Convention and to those of the international community as a whole as well as to those of the Court, and would in particular be such as seriously to disrupt the criminal justice systems of the States parties to the Convention, given the risk of proliferation of cases, and whereas it stated in that connection that States have an overriding interest in avoiding external judicial intervention which would interfere with the execution of a sentence passed at the end of an orderly process meeting the relevant human rights standards;

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23. Whereas on a request for the indication of provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, but whereas it may not indicate them unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded;

24. Whereas Article I of the Optional Protocol, which Paraguay invokes as the basis of jurisdiction of the Court in this case, is worded as follows:

"Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol";

25. Whereas, according to the information communicated by the Secretary-General of the United Nations as depositary, Paraguay and the United States are parties to the Vienna Convention and to the Optional Protocol, in each case without reservation;

26. Whereas Articles II and III of the aforementioned Protocol provide that within a period of two months after one party has notified the other of the existence of a dispute, the parties may agree to resort not to the International Court of Justice but to an arbitration tribunal or alternatively first to conciliation, but whereas these Articles

"when read in conjunction with those of Article I and with the Preamble to the Protocols, make it crystal clear that they are not to be understood as laying down a precondition of the applicability of the precise and categorical provision contained in Article I establishing the

compulsory jurisdiction of the Court in respect of disputes arising out of the interpretation or application of the Vienna Convention . . ." (*United States Diplomatic and Consular Staff in Tehran, (United States of America v. Iran), Judgment, 24 May 1980, I.C.J. Reports 1980*, pp. 25-26);

27. Whereas, in its Application and at the hearings, Paraguay stated that the issues in dispute between itself and the United States concern Articles 5 and 36 of the Vienna Convention and fall within the compulsory jurisdiction of the Court under Article I of the Optional Protocol; and whereas it concluded from this that the Court has the jurisdiction necessary to indicate the provisional measures requested;

28. Whereas at the hearing, the United States contended, for its part, that Paraguay had not established that the Court had jurisdiction in these proceedings, even prima facie; whereas it argued that there is no dispute between the Parties as to the interpretation of Article 36, subparagraph 1 *(b)*, of the Vienna Convention and nor is there a dispute as to its application, since the United States recognizes that the notification provided for was not carried out; whereas the United States maintained that the objections raised by Paraguay to the proceedings brought against its national do not constitute a dispute concerning the interpretation or application of the Vienna Convention; and whereas it added that there was no entitlement to *restitutio in integrum* under the terms of that Convention;

29. Whereas the United States moreover indicated to the Court that it had expressed its regret to Paraguay for the failure to notify Mr. Breard of his right to consular access, engaged in consultations with Paraguay on the matter and taken steps to ensure future compliance with its obligations under the Vienna Convention at both the federal and state level;

30. Whereas Paraguay asserts that it is nevertheless entitled to *restitutio in integrum*, that any criminal liability currently imposed on Mr. Breard should accordingly be recognized as void by the legal authorities of the United States and that the *status quo ante* should be restored in that Mr. Breard should have the benefit of the provisions of the Vienna Convention in any renewed proceedings brought against him, no objection to his continued detention meanwhile being made by Paraguay; whereas however the United States believes that these measures are not required by the Vienna Convention, would contravene the understanding underlying the adoption of Article 36 as well as the uniform practice of States, and would put this Court in a position of acting as a universal supreme court of criminal appeals;

31. Whereas there exists a dispute as to whether the relief sought by Paraguay is a remedy available under the Vienna Convention, in particular in relation to Articles 5 and 36 thereof; and whereas this is a dispute arising out of the application of the Convention within the meaning of Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes of 24 April 1963;

32. Whereas the United States claimed nevertheless that prima facie there is no jurisdiction for the Court in this case as Paraguay has no legally cognizable claim to the relief it seeks nor any prospect ultimately of prevailing on the merits, because no prejudice to Mr. Breard has occurred;

33. Whereas the existence of the relief sought by Paraguay under the Convention can only be determined at the stage of the merits, and whereas the issue of whether any such remedy is dependent upon evidence of prejudice to the accused in his trial and sentence can equally only be decided upon at the merits;

34. Whereas the Court finds that, prima facie, it has jurisdiction under Article I of the aforesaid Optional Protocol to decide the dispute between Paraguay and the United States;

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35. Whereas the power of the Court to indicate provisional measures under Article 41 of its Statute is intended to preserve the respective rights of the parties pending its decision, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings; whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant, or to the Respondent; and whereas such measures are only justified if there is urgency;

36. Whereas the Court will not order interim measures in the absence of "irreparable prejudice . . . to rights which are the subject of dispute . . ." (*Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 103; *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 19, para. 36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 19, para. 34);

37. Whereas the execution of Mr. Breard is ordered for 14 April 1998; and whereas such an execution would render it impossible for the Court to order the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims;

38. Whereas the issues before the Court in this case do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes; and whereas, further, the function of this Court is to resolve international legal disputes between States, *inter alia* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal;

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39. Whereas, in the light of the aforementioned considerations, the Court finds that the circumstances require it to indicate, as a matter of urgency, provisional measures in accordance with Article 41 of its Statute;

40. Whereas measures indicated by the Court for a stay of execution would necessarily be provisional in nature and would not in any way prejudge findings the Court might make on the merits; and whereas the measures indicated would preserve the respective rights of Paraguay and of the United States; and whereas it is appropriate that the Court, with the co-operation of the Parties, ensure that any decision on the merits be reached with all possible expedition,

41. For these reasons,

THE COURT

Unanimously,

1. *Indicates* the following provisional measures:

The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;

II. *Decides*, that, until the Court has given its final decision, it shall remain seised of the matters which form the subject-matter of this Order.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this ninth day of April, one thousand nine hundred and ninety-eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Paraguay and the Government of the United States of America, respectively.

(Signed) Christopher G. WEERAMANTRY,
Vice-President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

President SCHWEBEL and Judges ODA and KOROMA append declarations to the Order of the Court.

(Initialled) C.G.W.

(Initialled) E.V.O.